

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Children’s Television Programming Rules	)	MB Docket No. 18-202
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
To: The Commission		

**REPLY COMMENTS OF LITTON ENTERTAINMENT**

**LITTON ENTERTAINMENT**

James E. Dunstan  
Mobius Legal Group, PLLC  
P.O. Box 6104  
Springfield, VA 22150  
Telephone: (703) 851-2843  
Counsel to Litton Entertainment

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## SUMMARY

Commenters in this proceeding generally agree on a few key areas where the nearly 30 year old children's television rules can be updated to lessen the paperwork burden of stations and recognize the availability of information concerning on-air broadcast of E/I programming. These changes should be undertaken as soon as possible.

Where the comments diverge, however, is whether the bedrock principles that undergird the Children's Television Act have changed so dramatically so as to call into question the need for E/I programming on broadcast television. Yet commenters conflate "children's programming" with "children's *educational* programming." Most of the examples of other platforms delivering programming aimed at children highlight almost purely entertainment sources. Even worse, many of the most popular sources for children's programming are "toy unwrapping" videos online that would violate the Program Length Commercial and Host Selling prohibition if aired on broadcast television.

Some comments wish to greatly expand what can constitute "core" programming in the name of "flexibility." Expanding the definition of E/I programming to include general audience programming, however, violates both the language and intent of the CTA, wherein Congress defined educational programming to be "programming specifically designed to serve" the educational and information needs of children. Beyond expanding slightly the window in which "Core" programming can be aired, the FCC should not adopt measures that undercut the presentation of quality E/I programming.

Litton continues to support additional flexibility for rescheduling preemptions. However, comments suggest that stations have not carried "breaking news" or interrupted important weather coverage for fear of running afoul of the FCC's rules. The FCC should take this

opportunity to clarify once again that stations do not have to reschedule E/I programming preempted for breaking news. Beyond that, the flexibility suggested by Litton in its initial comments should solve the preemption scenarios raised by commenters.

Above all, the record in this proceeding makes clear that allowing broadcasters to move their E/I programming onto a multicast stream that is not available to many viewers is bad public policy, and would quickly result in the end of new E/I program production with any value at all. The economics of multicast carriage destroys the market for new quality E/I and would result in STEM curriculum conveyed in E/I programming being frozen in time, as broadcasters would have to turn to reruns of old shows to meet their E/I requirements. Further, the FCC must focus on the downstream ramifications of E/I on multicast: programming aired in Standard Definition as opposed to High Definition and loss of video described programming on a station's channel.

Finally, if the Commission is going to entertain proposals for stations to eliminate some of their programming obligation by allowing them to sponsor E/I programming on other stations in the market, it must adopt "similar coverage/similar carriage" requirements to avoid E/I programming ending up being aired on stations with far inferior geographic reach, or stations licensed to a periphery of a market.

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Litton Entertainment (“Litton”), pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), submits these Reply Comments in the above-referenced proceedings in response to the Commission’s Notice of Proposed Rulemaking, released July 13, 2018.<sup>1</sup> In support of these Reply Comments, Litton submits:

**I. INTRODUCTION**

The Commission has consistently held that, as temporary trustees of the public’s airwaves, broadcasters are obligated to operate their stations to serve the public interest—specifically, to air programming responsive to the needs and issues of the people in their communities of license.”<sup>2</sup> Programming responsive to the needs and issues of the people in the local community necessarily includes the educational and informational needs of children under 17 years of age. One of the very few statutory requirements under the CTA is to “serve[] the

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<sup>1</sup> *Children’s Television Programming Rules, Notice of Proposed Rulemaking*, FCC 18-93, released July 13, 2018 (hereinafter “*Children’s Television NPRM*” or “*NPRM*”). The *Children’s Programming NPRM* appeared in the Federal Register on July 25, 2018, and reply comments are due 90 days after publication. These Comments therefore are timely filed.

<sup>2</sup> See *Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 FCC Rcd 1324 ¶ 6 (2008).

educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.”<sup>3</sup> The rules adopted by the FCC have served the needs of children well. Moreover, while some aspects of the rules can use updating to reflect a digital world, the FCC is not free to abandon the clear statutory mandate from Congress. Nothing in the *NPRM* or comments can support abandoning the fundamental principles established by the CTA and enforced by the FCC for almost 30 years. Below, we address some of the major issues raised in comments.

## II. DISCUSSION

### A. Commenters Conflate “Children’s Programming” and “Children’s Educational Programming” Available on Other Platforms

The *NPRM* uses the supposed plethora of programming available to children on other platforms as rationale for “modernizing,” modifying, and perhaps relaxing the requirements of television broadcasters to provide educational and information (“E/I”) programming specifically designed for children.<sup>4</sup> Many commenters echo this position.<sup>5</sup> The problem with this argument

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<sup>3</sup> CTA, Section 103(a)(2).

<sup>4</sup> See *NPRM*, ¶ 16 (“there is a vast array of children’s programming available on non-broadcast platforms today. As NAB observes, myriad full-time children’s cable channels are flourishing, including Nickelodeon, Nick Jr., Teen Nick, Disney Channel, Disney Junior, and Disney XD, as are other channels, such as Discovery, Discovery Family, National Geographic, National Geographic Wild, Animal Planet, History Channel, and Smithsonian Channel, that provide educational and informational programming intended for viewers of all ages”).

<sup>5</sup> See Comments of NCTA, p. 1 (“Program networks that provide thousands of hours of high-quality children’s programming annually are proud of their record in serving parents and children and are committed to providing a safe space to entertain and educate children twelve years old and younger”). Note that NCTA’s comments do not speak to children between 12 and 16, also covered by the educational programming requirements of the Children’s Television Act (“CTA”). See also Comments of the National Association of Broadcasters (NAB), p. 29 (“Given the expansion in available children-oriented content across a variety of platforms available in homes and on the go, requirements for broadcasters to provide three hours of E/I programming per week on every full-time stream are no longer needed”); Comments of Meredith Broadcasting, footnote 9 (“To the extent certain commenters may be concerned that multicast streams are not carried by MVPDs or OTT platforms, there are other children’s programming options available on those platforms (e.g., Disney Channel or Nickelodeon)”).

is two-fold. First, just because programming is “directed at children” and may be “high-quality children’s programming,” does not mean that such content is the type of E/I programming contemplated by Congress in enacting the CTA. Indeed, the vast majority of the programming aired on the cited platforms is *entertainment* programming, not *educational* programming. Several Commenters, who have expertise in the area of how video programming is cognitively and psychologically processed by children, point out the dangers of equating “children’s programming” and “children’s *educational* programming.”<sup>6</sup>

Second, there is an effort in the *NPRM* and by commenters to equate programming that may educate general audiences with children’s educational programming that is age-appropriate and specifically produced for children under 17 years of age.<sup>7</sup> In 1990, Congress did not face a media marketplace bereft of programming aimed at children.<sup>8</sup> It also did not face a lack of overall quality programming for families that could serve to educate. What it faced was a lack of programming specifically directed at children whose main goal was education.<sup>9</sup> What Congress

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<sup>6</sup> See Comments of Center for Digital Democracy, et al. (“CDD”), p. 27 (“The NPRM makes no effort to identify or quantify how much non-broadcast children’s programming is specifically designed to educate or inform. . . Much of the children’s programming offered on Hulu Kids, Amazon, YouTube and Netflix was originally produced for cable television by companies such as Disney, Nickelodeon and Cartoon Network, and is not designed with educating children as a specific purpose. Rather, the bulk of these programs are designed primarily to entertain children. Nor does the original programming on the streaming services appear to be designed with a specific purpose to educate children”); Comments of Common Sense Kids, p. 10 (“Furthermore, we are concerned that the NPRM conflates “children’s media” with “educational media” and vice versa. The CTA is intended to further media that is (1) for children and (2) educational; falling into one or the other bucket is not sufficient”).

<sup>7</sup> See *NPRM*, ¶ 16 (“channels, such as Discovery, Discovery Family, National Geographic, National Geographic Wild, Animal Planet, History Channel, and Smithsonian Channel, that provide educational and informational programming intended *for viewers of all ages*”) (emphasis added).

<sup>8</sup> Most of the cable channels cited in the *NPRM* predate the CTA. The Disney Channel launched in 1983. Nickelodeon launched in 1977.

<sup>9</sup> See CTA, Section 103(a)(2) (the CTA directs the FCC at license renewal to ensure that TV stations have “served the educational and informational needs of children through the licensee’s overall programming, including programming *specifically designed to serve such needs*”) (emphasis added); CTA, Section 202(5) (“educational television programming for children is aired too infrequently either because public broadcast licensees and permittees lack funds or because commercial broadcast licensees and permittees

mandated, therefore, was that commercial television broadcasters, as licensees and trustees of the public's airwaves, provide *children's educational/informational programming*. As the Center for Digital Democracy puts it: "only television broadcasters are mandated to provide programming specifically designed to educate and inform children. Relying on mere surmise, the NPRM makes no attempt to quantify how much actual educational—as opposed to entertainment—children's programming is available on non-broadcast services."<sup>10</sup>

It is important to note that no producer of programming for any other platform has filed comments in this proceeding defending the educational quality of its programming. Nor is it administratively possible for the FCC to cull through the 300 hours of videos uploaded to YouTube every minute<sup>11</sup> to determine which, if any, would qualify as educational under the CTA, i.e., the programming was produced specifically for children with education being a central purpose of the program production. Tellingly, NCTA notes in its comments, "unlike broadcasters, [cable networks] have no separate reason to distinguish 'educational and informational' programming from the other children's programming they provide on related channels."<sup>12</sup>

Equally dangerous is the suggestion that the Internet can be relied upon as a valid source for safe, educational programming for children. While there are educational videos and other

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or cable television system operators do not have the economic incentive"); CTA Section 203(i)(1) ("the term 'educational television programming for children' means any television program which is directed to an audience of children who are 16 years of age or younger and which is designed for the intellectual development of those children, except that such term does not include any television program which is directed to a general audience but which might also be viewed by a significant number of children").

<sup>10</sup> CDD Comments, p. 2.

<sup>11</sup> See "36 Mind Blowing YouTube Facts, Figures and Statistics – 2017," <http://videonitch.com/2017/12/13/36-mind-blowing-youtube-facts-figures-statistics-2017-re-post/>.

<sup>12</sup> NCTA Comment, p. 11.



content available on the Internet that parents can share with their children, if they have the time to research fully the quality and educational content, the Internet is largely uncured. No other platforms are subject to requirements to provide programming specifically designed to educate and inform children, reduce to writing the educational purpose of the programming,<sup>13</sup> inform parents that the programming has an educational intent through use of the “E/I” watermark,<sup>14</sup> limit the number of commercial on videos aimed at children 12 and younger, or avoid Program Length Commercials<sup>15</sup> or Host Selling.<sup>16</sup> Various commenters warn the Commission of the danger of simply turning educational children’s programming over to the Internet because there is little to no quality control on the Internet.<sup>17</sup> Large content platforms have been the subject of numerous and extensive complaints to the FTC that their programming would violate the FCC’s rules.<sup>18</sup> Many of the most popular videos on YouTube are nothing more than Program Length

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<sup>13</sup>47 C.F.R. § 73.671(c)(6).

<sup>14</sup> 47 C.F.R. 73.671(C)(5)

<sup>15</sup> *Policies and Rules Concerning Children’s Television Programming, Report and Order*, 6 FCC Rcd 2111 (1991), ¶¶ 40-46 (*1991 Report and Order*), recon. granted in part, 6 FCC Rcd 5093 (1991) (*1991 Reconsideration Order*).

<sup>16</sup> *See Children’s Television Report and Policy Statement*, 50 FCC 2d 1, 11 (1974), *affd.*, *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (“1974 Policy Statement”).

<sup>17</sup> *See* Comments of the National Hispanic Media Coalition, p. 12 (“Moreover, it is clear that there is little quality control for content over the Internet, so children could easily be exposed to inappropriate, malicious, and violent content”). *See also* Comments of Common Sense Kids, p. 9 (“We are particularly concerned that the Commission treats unregulated, streaming video sources as equivalent to educational broadcast television in the NPRM. Internet sources of media content are not subject to FCC oversight, and thus do not have to comply with decency rules or advertising limits. Television is a uniquely moderated medium, and as such it is a gift to parents, who can be confident that what their child views on television is not harmful or inappropriate. The same cannot be said of Internet video platforms, whose content is frequently the source of complaints and concern – by advocates, parents, and Congress alike. For example, YouTube has recently faced criticism, a letter from concerned U.S. Senators, and an FTC Complaint, after it recommended inappropriate content to young children, including pornography disguised as the popular children’s show Peppa Pig”) (footnote omitted).

<sup>18</sup> *See* CDD Comments, pp. 24-25 (“As CDD and CCFC have argued in multiple complaints filed with the FTC, much of the children’s programming on YouTube and YouTube Kids would violate the FCC rules”).

Commercials.<sup>19</sup> It is no surprise that toy advertisers, limited in how they can advertise their toys on broadcast television, are now turning more and more to the Internet to advertise their toy lines to children with exactly the type of programming Congress worried about in 1990.<sup>20</sup>

The situation for older children (tweens and teens) is even worse. If we are to rely on the Internet to educate our teens, what are they going to be exposed to? Some commenters suggest that teens somehow will receive an education that is sufficient to meet Congress' mandate through YouTube, Instagram, SnapChat, and Facebook.<sup>21</sup> Yet teens are often unsupervised in their use of the Internet (and especially social media), and can be easily drawn to far more graphic content that sits just one or two clicks away. It is difficult to understand how any stakeholder could propose to equate social media apps with the STEM-based programming Litton has pioneered on broadcast television that has garnered 15 Emmys and 46 Parents' Choice awards. In addition to its 15 Emmys, Litton has won 22 of the 24 Parents' Choice awards for programming aimed at children 13-16 (the other two are also broadcast programs created to satisfy the CTA). No video programming produced for other platforms won any Parents' Choice awards in 2018.<sup>22</sup>

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<sup>19</sup> See CDD Comments, p. 25 (“‘Unboxing’ videos, which show kids opening toys and playing with them, are extremely popular on YouTube. . . Of the top 10 most-watched YouTube channels in the US in 2018, two—Ryan ToysReview and FunToys Collector Disney Toys Review—are toy unboxing channels, and they have racked up a combined 38.6 billion views since launching. . . Twenty of the top 100 YouTube channels in 2016 were toy channels. Under the FCC rules, these videos would be considered host selling and could not be shown on broadcast or cable. These unboxing videos appear not only on YouTube but on YouTube kids. On YouTube Kids, children can also watch many branded channels including McDonalds, Barbie, Fisher Price, and LEGO”) (internal footnotes omitted).

<sup>20</sup> See NCTA Comments, footnote 17 (“As just two examples, last year, Mattel made its first ‘upfront’ advertising spending commitment to YouTube Kids and Hasbro has launched a new program online”).

<sup>21</sup> See NAB Comments, p. 11 (teens “are accessing social media platforms in huge numbers: 85 percent of teens use YouTube, 72 percent use Instagram, 69 percent use Snapchat, and 51 percent use Facebook”).

<sup>22</sup> See [http://www.parents-choice.org/award.cfm?thePage=television&p\\_code=p\\_tel&c\\_code=c\\_tel&orderby=age](http://www.parents-choice.org/award.cfm?thePage=television&p_code=p_tel&c_code=c_tel&orderby=age). The Parents' Choice Foundation describes its evaluation process as follows: “The multi-tiered evaluation process is as true to its integrity today as it was when Parents' Choice Foundation was established almost thirty years

Regardless, these uncured video sources are no substitute for statutorily mandated educational programming that is a condition of the broadcast license. As NAB President Gordon Smith stated, "Everyone wants what we have – our airwaves. But, none of our competitors want the same responsibilities that come with being a broadcaster."<sup>23</sup> Serving “the educational and informational needs of children”<sup>24</sup> is one of the great responsibilities that is a condition of being awarded a broadcast license.

### **B. Linear Viewing is Far From Dead – Regularly Scheduled Programming Still Dominates Broadcast Television Schedules**

A second argument Commenters raise for relieving broadcasters from providing E/I programming is that linear viewing of television is all but dead.<sup>25</sup> This argument fails for multiple reasons.

First, this contradicts the FCC’s findings in 1996 demonstrating that children benefit from accessing programming on a regular basis so that they engage more fully with the

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ago. The Parents' Choice Awards Committees evaluation process offers objectivity, respect, and expertise – and all with a sense of humor. Learning is fun – and we want kids to know that. The Parents’ Choice Awards evaluation process is a lengthy and confidential one. We don’t offer “feedback” to producers or manufacturers because we don’t work for them. We work for parents, caregivers, librarians and educators. Approximately 20% of those items submitted to the Parents’ Choice Awards™ program receive a commendation in one of the six award levels: Classic, Gold, Silver, Recommended, Approved, and Fun Stuff, underscoring the influential and celebrated achievement of being honored with a commendation from the Parents’ Choice Awards program.” See <http://www.parents-choice.org/aboutawards.cfm>.

<sup>23</sup> See “Smith: Spectrum's Higher, Better Use Is Still Broadcasting,” *Broadcasting & Cable*, February 22, 2016, <https://www.broadcastingcable.com/news/smith-spectrums-higher-better-use-still-broadcasting-153987>.

<sup>24</sup> 47 USC 303b(a)(2).

<sup>25</sup> See, e.g., Comments of Gray Television, p. 5 (“When the Commission adopted its children’s programming rules in 1996, appointment viewing was the only way to access quality video programming. Today, more than two decades later, the programming landscape is very different. Linear TV viewing has declined as consumers routinely access content on multiple platforms via multiple devices”) (footnotes omitted); Network Commenters, p. 4 (“With the widespread availability today of on-demand, time-shifted, and online children’s programming available at any time from an array of sources, the fact that programming airs on a regularly scheduled weekly basis no longer bears any reasonable relationship to whether it serves the educational and informational needs of children”).

characters and the educational messages can be repeated and reinforced.<sup>26</sup> Having children's E/I programming available on a set schedule on a regular basis is just as important today as it was in 1990.<sup>27</sup> Litton's own viewership numbers further demonstrate this.<sup>28</sup> There have been no scientific, academic, or other empirical studies submitted in the record of this proceeding that undercut the extensive work done in the 1990s regarding the importance of regularly scheduled programming in furthering the educational purpose of a program.<sup>29</sup>

Second, the argument that people no longer view television according to a regular schedule is inconsistent with the programming schedules of virtually every television broadcaster. Were that the case, television stations would abandon the half-hour grid that has ruled television from its inception and just provide a running schedule with links to where viewers could find on-demand programming. The television networks pay large fees for the rights to sporting events that they brand as appointment television (e.g., "Sunday Night

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<sup>26</sup> See *1996 Order*, ¶ 105 ("We agree with those commenters who argue that programs that air regularly can reinforce lessons from episode to episode. We also believe that regularly scheduled programs can develop a theme which enhances the impact of the educational and informational message") (footnotes omitted).

<sup>27</sup> See Comments of Institute for the Study of Knowledge, p. 11 ("According to a report by the nonprofit media advocacy group Common Sense, among teens 'half (50 percent) of all TV- and video-viewing time consists of watching TV programming on a TV set at the time it is broadcast'").

<sup>28</sup> Litton Comments, pp. 6-7.

<sup>29</sup> See *1996 Order*, ¶¶ 105-107. See also, Comments of Common Sense Kids, p. 7 ("Regularly scheduled programming gives children an opportunity to learn from familiar characters and similar situations by watching different episodes of the same show from week to week. This increases children's comprehension and retention of the lessons contained in the programming when compared to singly aired specials. Regularly scheduled programming also allows parents to plan ahead regarding children's media use, and this type of intentional media usage is recommended by the American Academy of Pediatrics and other health or childhood organizations. Parents may also be more likely to co-view when it's a predictable, recurrent set of characters. For these reasons we think the requirement that core programming be regularly scheduled should not be changed").

Football,” “Thursday Night Football”). The same is true for prime-time news and morning shows such as “Today,” “Good Morning American,” and “CBS Morning News.”<sup>30</sup>

As Litton’s initial Comments in this proceeding demonstrate, children and their families *do* watch Litton’s programming, to the tune of one *billion* total views last year.<sup>31</sup> Commenters are very careful in how they report viewership, usually concentrating on the decrease in viewers ages 2-11 on Saturday mornings (the traditional landing place for most E/I shows). For example, the Network Commenters state: “For children ages 2 to 11, viewing on Saturday mornings across the four major English-language networks has declined 71% since 2007 despite the addition of educational and informational programming on all multicast channels.”<sup>32</sup> There are two problems with this statement: 1) since commercial stations affiliated with all four of the Top-4 networks provide programming targeted at children 13-16, it should be no wonder that viewership by children 2-11 has declined; and 2) the Commenters fail to explain fully how viewership of multicast channels was factored into their ratings analysis, given that prior to the digital transition in 2009, multicast channels did not exist.<sup>33</sup> Other commenters simply overstate the extent of the alleged decline in viewership.<sup>34</sup> Overall, broadcast network ratings have declined over the past decade as a result of: 1) audience fragmentation flowing from new video distribution competition; and 2) Nielsen’s failure to capture delayed viewing on DVRs, video demand, and other Over-The-Top services.

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<sup>30</sup> See <https://www.nytimes.com/2016/11/28/sports/football/monday-night-football-tv-ratings-espn.html>.

<sup>31</sup> Litton Comments, pp. 6-7.

<sup>32</sup> See, e.g. Network Commenters, p. 2.

<sup>33</sup> Further, as admitted by NAB and others, *infra* note 55, multicast channels have virtually no viewership. Depending on how the calculations are done, this 71 percent “drop” may not be accurate.

<sup>34</sup> Nexstar Broadcasting, footnote 9, alleges that viewership “has declined exponentially” when it alleges a 45 percent drop since 2012. Losing less than half an audience is hardly an “exponential” drop.

Other commenters counter with the fact that television is still the dominant medium. “[Y]oung viewers will nevertheless continue to watch “9-and-a-half hours per week [of broadcast Television] in Q2 2018.”<sup>35</sup> As the Institute for the Study of Knowledge concludes:

Thus, despite the “vast array of children’s programming available,” television remains the preferred choice for children. And, even if the decline of children’s usage of broadcast television continues as alternatives keep growing, it is hard to foresee any future in the near term in which broadcast television will not retain its predominant role in the lives of Americans, including children.<sup>36</sup>

Over-the-air television still holds a dominant position in households in America, and is still programmed by stations on a half-hour regularly schedule grid. Children’s E/I programming should continue to be treated in the same way that stations treat other important programming – accessible to their viewers and regularly scheduled.<sup>37</sup>

Moreover, to the extent that broadcasters believe they understand and are closer to viewers than those at the FCC are,<sup>38</sup> they have been free since 1996 to program less than three hours a week of E/I programming, and justify their decisions under the so-called “Category B” license renewal standard.<sup>39</sup> Stations have regularly eschewed using this standard, because the FCC rightfully placed the burden on licensees to demonstrate how their programming had the

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<sup>35</sup> Comments of Institute for the Study of Knowledge, p. 7.

<sup>36</sup> *Id.*, p. 12.

<sup>37</sup> To the extent the FCC considers relaxing a strict 3 hours per week rule to provide broadcasters more flexibility (especially during quarters where a high degree of sports program airs on Saturday mornings), it should impose affirmative obligations on stations to inform viewers of where it will air E/I content, similar to what the rules currently require for preemptions.

<sup>38</sup> *See, e.g.*, National Religious Broadcasters, p. 7 (“Local broadcasters know best how to reach their children viewers, and should be allowed to craft their own plans for doing so without the threat of penalty or license renewal delay”).

<sup>39</sup> *See 1996 Order*, ¶¶ 133-34.

equivalent impact of regularly scheduling three hours of Core Programming per week.<sup>40</sup> To the extent the FCC believes “Category B” provides licensees flexibility they need, it can use this proceeding to provide additional guidance on the standards under which licenses can be renewed in the face of a record of airing Core Programming that is less than three hours per week. Any additional guidance, however, must be consistent with the congressional mandate that to qualify as children’s educational programming, that programming must be specifically designed to educate children 16 years of age and younger, as the next section demonstrates.

**C. The Commission Should Reject Attempts to Expand the Definition of E/I Programming to Include General Audience Programming in Direct Contradiction to the Definition Congress Adopted in the CTA**

A number of commenters seek to expand the definition of “educational television programming for children” to include a vast array of programming not specifically designed to educate children. Some commenters want the definition of core programming “broadened to include programming that is . . . appropriate for all ages and is of civic importance.”<sup>41</sup> This definition presumably includes live sports broadcasts,<sup>42</sup> and family-oriented specials, such as live musicals and holiday specials.<sup>43</sup> Further, some commenters propose eliminating the requirement

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<sup>40</sup> *Id.* at ¶ 133 (“A broadcaster seeking to secure staff approval under this category must show that any reasonable observer would recognize its commitment to educating and informing children to be at least equivalent to the commitment reflected in Category A”); *see also* *NPRM*, ¶ 8 (“Licensees have rarely attempted to demonstrate compliance under Category B due to uncertainty as to how much Core Programming must be provided”).

<sup>41</sup> Comments of Cadillac Telecasting Company, p. 2.

<sup>42</sup> *Id.* at p. 9 (“Whether it is sharing in the joys of the world’s most viewed competitive sporting tournament or observing the passing of a modern-day American hero, these types of ‘one-off’ (but not ‘breaking news’) preemption events should at the very least eliminate the need for broadcasters to push the originally-scheduled programming to a ‘second home’ or second date. Ideally, those events in and of themselves should qualify as educational or informational due to their civic importance, and thus, count towards a licensee’s Core Programming obligation under Section 73.671(c) of the Commission’s rules”).

<sup>43</sup> Network Commenters, p. 4.

for stations to justify that such programming meets the educational needs of children.<sup>44</sup> Finally, a number of commenters want no quantitative requirement attached to E/I programming at all:

No specific quantity or length of such programming should be mandated. Stations should be allowed to air any children’s directed programming (short or long-form) at whatever times of the day they deem appropriate to reach children in their audiences, without a defined time window. Local broadcasters know best how to reach their children viewers, and should be allowed to craft their own plans for doing so without the threat of penalty or license renewal delay.<sup>45</sup>

This, of course, would return children’s educational programming to the pre-1996 days where the position of the broadcast industry was “just trust us.” Other commenters rightly point out what happened between the years of 1991 and 1996 when there were no quantitative standards or definitions of what constitutes E/I programming. “[T]he initial implementation of the CTA failed to properly hold broadcasters accountable, so broadcasters could pass off television shows like *Yogi Bear* as educational.”<sup>46</sup>

The FCC in 1996 looked at the language of the CTA, and its legislative history, and concluded that Congress had provided a definition of what constitutes children’s educational television programming: programming that is “specifically designed” to serve children’s educational and informational needs.<sup>47</sup> In the *1996 Order*, the FCC rejected the notion that airing general audience programming alone was sufficient to meet the requirements of the

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<sup>44</sup> See Comments of Nexstar, p. 6 (advocating for “eliminating the requirement that broadcasters specify, in writing, ‘the educational and informational objective and the target child audience’”).

<sup>45</sup> Comments of National Religious Broadcasters, p. 4.

<sup>46</sup> Comments of National Hispanic Media Coalition, p. 13. See also Comments of Common Sense Kids Action, p. 10 (prior to the *1996 Order* “there were no standards for what constituted educational children’s programming beyond a general guideline for broadcasters to air some amount of standard-length educational and informational programming ‘specifically designed for children 16 years of age and under.’ As a result, broadcasters were labeling children’s shows with no educational content such as *Chip n Dale Rescue Rangers*, *GI Joe*, and *Ducktales* as E/I programming. They were also designating as E/I programming shows for general audiences—including the *Jerry Springer Show*”) (footnotes omitted).

<sup>47</sup> *1996 Order*, ¶ 73, citing 47 U.S.C. § 303b(a)(2).



CTA.<sup>48</sup> Unless and until the Commission can find different support from the language of the CTA and its legislative history to conclude that Congress intended the “specifically designed” language to mean something other than “specifically designed,” the Commission cannot read out this statutory language and enlarge the definition of core E/I programming to include the types of general audience programming that some comments support herein. The FCC simply lacks the discretion to ignore this statutory language.<sup>49</sup>

**D. The Preemption Difficulties Experienced by Broadcasters are Overblown and Can Be Cured With Increased Flexibility and Elimination of the Fixed Second Home Policy**

Litton supports granting additional flexibility to stations when it comes to preemptions and the “fixed second home” policy.<sup>50</sup> Having said that, it is important to note that the total E/I requirement accounts for less than two percent of a broadcaster’s programming schedule. Moreover, comments regarding preemptions plainly are overblown, and more significantly, ignore existing FCC rules related to “breaking news.”

Several commenters talk about the “burdens” placed on them in having to reschedule E/I programming preempted because of breaking news, or the choice of not airing that breaking news at all.<sup>51</sup> In using breaking news to justify greater flexibility, however, these stakeholders apparently are unaware of the very clear FCC policy that allows stations *not* to reschedule E/I programming preempted for breaking news.

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<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999) (EPA not allowed to take into account costs of implementing standards of the Clean Air Act where statute clear prohibits the EPA from so doing).

<sup>50</sup> Litton Comments, p. 26

<sup>51</sup> See Comments of NAB, pp. 23-24 (stations hampered by “network breaking news”); Nexstar Comments, p. 10 (burdens of “breaking network news coverage”).

We will continue to exempt from the requirement that core programs be rescheduled core programs [sic] preempted for breaking news. Absent clear evidence that broadcasters are abusing this exemption, we intend to rely on broadcasters' journalistic judgment regarding the necessity of interrupting scheduled core programming because of a news alert.<sup>52</sup>

Even the current *NPRM* recognizes the breaking news exemption from rescheduling.

“Under our existing policies, if a station preempts an episode of a core program *for any reason other than breaking news*, the station generally must air the rescheduled program in a previously selected ‘second home’ and provide an on-air notification of the schedule change in order for the rescheduled program to count toward compliance with the processing guideline.”<sup>53</sup> To the extent that licensees do not understand the breaking news exemption, Litton suggests that the FCC provide education and clarification to licensees.<sup>54</sup>

#### **E. Multicast-Only Carriage Means the Loss of Hundreds of Millions of Viewers and Ultimately the Loss of New Quality E/I Programming**

Litton continues to believe that allowing television licensees to take their E/I programming off their main channel and put it on a multicast channel will mean the death of newly produced quality educational children's programming.<sup>55</sup> The Comments in this proceeding bear that out – there is virtually no audience for multicast programming, and no advertising revenues can be generated on programming produced for multicast channels.<sup>56</sup>

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<sup>52</sup> 2004 Order, ¶ 39. See *id.*, ¶ 37 (“Specifically, within certain limitations, the Bureau advised that preempted core programs could count toward a station's core programming obligation if the program were rescheduled, except for core programs preempted for “breaking news,” which do not need to be rescheduled under this policy”).

<sup>53</sup> *NPRM*, ¶ 57 (emphasis added).

<sup>54</sup> Litton has understood this exemption since the FCC clarified it 14 years ago, and has never complained to any station carrying Litton programming about a preemption for breaking news. Litton understands that no matter how important educational children's programming is, breaking news, especially reporting on local severe weather, must take precedence to inform and protect a local community.

<sup>55</sup> See Litton Comments, pp. 13-18.

<sup>56</sup> See CDD Comments, p. 14 & fn 35 (“The *NPRM* cites no data on viewership of multicast channels, but all indications are that it is quite small,” citing *Annual Assessment of the Status of Competition in the*

Similarly, the audience of OTA TV households is not large enough to support the production of quality E/I programming aimed solely at them. Commenters argue that the only thing the FCC should be worried about are the approximately “582,000 television households with children ages 2-17 that have neither MVPD nor internet service.”<sup>57</sup> When Congress required broadcasters to carry E/I programming on their broadcast networks, the mandate implicitly ensured that, due to broadcasters’ must-carry and retransmission consent rights, all viewers would have access to the programming regardless of their choice of distribution platform. Moreover, 582,000 viewers represents just 0.5% of total television households of over 113 million in the United States. Commenters fail to state how stations or producers are supposed to provide quality E/I programming in a marketplace without viewers and without revenues, especially in light of Congress’ finding that advertising revenues and sponsorships were to be the engine to drive the marketplace for quality E/I programming.<sup>58</sup>

Indeed, broadcast commenters acknowledge that E/I programming carried on multicast streams will not be available to millions upon millions of television households because MVPD

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*Market for the Delivery of Video Programming*, 32 F.C.C. Rcd. 568 at ¶ 112 (2017); *id.* at n. 35 (“National Association of Broadcasters 2016 Television Financial Report estimated that only 1.1 percent of an average station’s total net revenue was from multicast channels”).

<sup>57</sup> NAB Comments, p. 20.

<sup>58</sup> Litton Comments, p. 4 & fn 12, *quoting* H.R. 1677, Section 101 (“Congress finds that . . . (3) the financial support of advertisers assists in the provision of programming to children”), *quoting* 1991 *Report and Order*, fn 24 (“Indeed, we wish to encourage the sponsorship of educational and informational material”). Maranatha Broadcasting admits that without viewers and advertisers, it is impossible to produce programming. Maranatha Broadcasting Comments, p. 4 (“Children’s educational programming, like any other programming on a broadcast station, needs to attract an audience to be able to pay for itself – and the larger the audience, the more likely that the quality of such programming will increase”). The 1996 *Order* made this clear at ¶ 48: “Commercial television is advertiser supported. As we discuss above, advertisers pay according to audience size, and broadcasters have disincentives to air programs that attract small audiences. Parents can increase the audience of an educational program by encouraging their children to watch the show, but can only do so if they know in advance when the show will air and that the show is educational. Increasing the audience size for educational programs increases the incentive of broadcasters to air, and producers to supply, more such programs.”

providers do not carry these multicast streams.<sup>59</sup> The argument that it is better to air E/I programming on a multicast stream at a time when children might be watching (i.e., Saturday mornings),<sup>60</sup> thus rings hollow, when commenters are well aware that the vast majority of children will never have access to that programming.<sup>61</sup> Several commenters point out the hypocrisy of this position.<sup>62</sup>

What will children's E/I programming look like in a world where it is only carried on multicast streams? Simple. It will be dominated by reruns of decades-old E/I programming such as "Bill Nye the Science Guy," "Beakman's World," and "Saved By the Bell."<sup>63</sup> The National Hispanic Media Coalition puts it best:

The NPRM's proposed rule changes would allow private broadcasters to incur additional benefits at the expense of American children. Leaving educational

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<sup>59</sup> See Gray Comments at fn 24 (comparable MVPD carriage not required).

<sup>60</sup> Network Commenters, p. 8.

<sup>61</sup> Meredith's comments that multicast channels are available to all viewers in a market is disingenuous at best. Meredith Comments, p. 3 ("Viewers have access to Channel 4.3 the same as they have access to Channel 4.1"). This simply is not true. Viewers subscribing to DISH or DirecTV in any of Meredith's stations do not have the same access to Channel 4.3 as they do to 4.1. In order to receive 4.3, they must change the input to their television sets to receive 4.3 over the air with the use of an external antenna. If Meredith is correct, then there remains no constitutional defense to the must-carry statute, as the "A/B Switch" solution must now exist. Similarly, for viewers who subscribe to MVPD systems because they live outside of the digital contours of their local television stations, even the "A/B Switch" solution would not exist, as unplugging from their MVPD would leave them with no signal at all. Thus, the proposed multicast solution to E/I programming would disproportionately harm rural viewers who must rely on MVPD delivery methods to receive any local television programming at all.

<sup>62</sup> See, e.g., Common Sense Kids Action Comments, p. 5 ("MVPD operators are not required to carry every multicast stream offered by a broadcaster, and many only carry a station's primary content stream. The most popular national multicast channel carrying children's programming is Qubo, and it only receives 67% national coverage. This means that 1/3 of families cannot view Qubo, because their cable or satellite provider does not carry it in their area. No other children's network is in the top 25 list of multicast channels").

<sup>63</sup> Litton Comments, pp. 16-17 (MeTV, which is predominately carried as multicast programming uses reruns of these shows to meet the current requirement that each multicast stream air three hours of E/I content).

programming up to broadcasters' discretion means that free educational programs will eventually disappear from free broadcast television.<sup>64</sup>

Having produced educational children's television since *before* the CTA was enacted, Litton can attest to this – and that “eventually disappear” will happen faster than anyone could imagine. The changeover to canned reruns will have to begin simultaneously with moving E/I programming over to multicast. No program producer will be able to produce new quality programming for multicast. More important, the STEM curriculum undergirding E/I programming will be frozen, exactly at a time when both the National Science Foundation<sup>65</sup> and the U.S. Department of Education<sup>66</sup> have called for innovation in STEM education, not a retrenchment to educational approaches taken decades ago. The ongoing debate about whether Pluto<sup>67</sup> is a planet will not be conveyed to children, at least not through educational children's programming. And Zack Morris, Kelly Kapowski and Jessie Spano will forever remain teenagers on “Saved by the Bell,” dealing with teenage problems from the 1990s (while the actors portraying those characters are well into their 40s today).



To the extent that the Commission somehow believes that stations will get back into the production of local E/I programming, one commenter indirectly supplied that answer: “In

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<sup>64</sup> National Hispanic Media Coalition Comments, p. 4.

<sup>65</sup> See “Educating for Today, Preparing for Tomorrow,” National Science Foundation, 2013, available at [https://www.nsf.gov/about/congress/reports/ehr\\_research.pdf](https://www.nsf.gov/about/congress/reports/ehr_research.pdf).

<sup>66</sup> See “STEM 2026: A Vision for Innovation in STEM Education,” U.S. Department of Education, September, 2016, available at [https://innovation.ed.gov/files/2016/09/AIR-STEM2026\\_Report\\_2016.pdf](https://innovation.ed.gov/files/2016/09/AIR-STEM2026_Report_2016.pdf).

<sup>67</sup> See, e.g., “Why Is Pluto No Longer a Planet,” Popular Science, October 17, 2018, available at <https://www.popsci.com/why-is-pluto-no-longer-planet>.

today's marketplace, it has proven impossible for [us] to sell a single advertiser commercial time in any of its children's programming."<sup>68</sup> No broadcaster will step up and produce local E/I programming that is destined for a multicast channel that no one watches.

In that regard, the multicast argument is not about profit (Litton's or any other children's E/I programming producer), it is about the fundamental economics of television program production, economics that Congress understood in 1990. The FCC must not ignore or evade consideration of this critical issue. If multicast channels only generate one percent of the advertising revenues that a station's main channel generates, that means program production budgets would have to be slashed by 98% or more. What sort of quality E/I program can be produced for that budget? The answer is simple and clear – none.

**F. Multicast-Only Carriage Means Loss of Video Quality, Loss of Vital Video Described Programming on the Main Channel**

Neither the *NPRM* nor the vast majority of commenters discuss the secondary repercussions of relegating E/I programming to multicast channels. Having produced quality E/I programming since before Congress enacted the CTA, no one understands the dynamics of the children's television marketplace as well as Litton. Litton clearly demonstrated these ripple effects in its initial comments.<sup>69</sup>

Since virtually all multicast channels are transmitted at a lower bitrate than the main channel's data stream, E/I programming airing on multicast channels will not air in full high definition.<sup>70</sup> This may work if the FCC does not mind a children's educational programming

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<sup>68</sup> Maranatha Broadcasting Comments, p. 4; *see also* Comments of Block Communications, Inc. p.2 ("To be successful, broadcast programming for children needs to be accessible to children and economical for television stations").

<sup>69</sup> Litton Comments, pp. 16-25.

<sup>70</sup> Maranatha admits this in its comments, p. 2 ("MBC was forced to degrade its two channels on the shared spectrum to add a third channel in order for WFMZ-TV to rebroadcast another of its subchannels

world with 20-year-old analog programming that looks fine in multicast standard definition. Yet even reruns of Litton’s existing library of full HD programming would end up degraded on a standard definition multicast stream, ultimately chasing away even the few viewers who could find and receive that programming.

Moving E/I programming to multicast channels may also leave a giant hole in the schedule for each Top-60 DMA station affiliated with a Big Four network in terms of meeting the FCC’s requirement for video described programming.<sup>71</sup> Litton currently provides 39 hours per calendar quarter that Big Four affiliates in the Top 60 DMAs can “count” toward their 87½-hour quarterly requirement of video described programming. If the E/I programming goes over to multicast, stations may need to scramble to replace those 39 hours of video described programming. Even if the Big Four networks ultimately provide a sufficient number of video described programming hours to affiliates, however, there would still be a net loss of age-appropriate video described programming available to children: children and families of children who could benefit from video described E/I programming will lose that content if they subscribe to an MVPD carrier that does not carry the multicast stream to which a television licensee has relegated its E/I commitment.<sup>72</sup>

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on which the children’s programming could be run”). *Compare* Cadillac Telecasting Company, p. 6 where it argues that the signal **strength** of a multicast channel is the same as the signal strength of the main channel. While this may be true, Cadillac does not address the **quality** of the signal – the vast majority of multicast channels are transmitted in standard definition.

<sup>71</sup> Litton Comments, pp. 18-19. Litton obviously does not have visibility into the Big Four networks’ approach to video description; as a result, Litton is uncertain how much video-described programming each of the Big Four networks provides to its affiliates.

<sup>72</sup> See Letter of American Foundation for the Blind to Chairman Pai, dated October 9, 2018, appended hereto.

**G. Any Rule Change Allowing Broadcasters to Avoid Airing Three Hours of Programming on Their Main Channel Must Have a “Similar Coverage/Similar Carriage” Requirement**

One area where broadcasters seek flexibility is a change in the rules to allow them to offload their statutory requirement to provide E/I programming to other stations in the same television market.<sup>73</sup> Even Public Television Commenters support this notion, presumably, because they believe that commercial television stations would rather pay non-commercial stations in their markets to run E/I programming than air such programming themselves.<sup>74</sup> There is no evidence that suggests “[v]iewers do not care on which station a particular E/I program airs or whether every station in their market airs the exact same amount of core programming.”<sup>75</sup>

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<sup>73</sup> See NAB Comments, p. 32 (“Consistent with its safe harbor proposal, NAB therefore believes that broadcasters should have the flexibility to decide the specific amount of core programming they air, and how much they sponsor on another same-market station, whether commercial or noncommercial, provided that, in combination, those hours total 156 hours per year. Sponsored programming should be counted on a minute-for-minute basis, with each minute of a sponsored program being treated as equivalent to one minute of programming on the licensee’s stream”); Maranatha Broadcasting Comments, p. 4 (“The Commission should allow all stations to meet their children’s obligations by arranging for that programming to be aired on any station in the same market as the broadcaster”).

<sup>74</sup> Comments of America’s Public Television Stations, Corporation for Public Broadcasting, Public Broadcasting Service (hereinafter “Public Television Commenters”), p. 9 (“PTV welcomes the Commission’s proposal to better enable broadcasters to support educational programming aired on other stations in their market. Such sponsorship efforts could supplement existing funding sources, thereby enabling PTV stations to develop additional curriculum-driven, research-based content and to deliver it through their expansive distribution platforms that are freely available to all Americans”).

<sup>75</sup> NAB Comments, p. 32. Litton finds this statement extremely surprising. In its relationship with networks and network affiliates, network brand has been a key component – Litton creates a three hour block of programming for ABC, CBS, NBC, and CW that is branded to match the network’s positioning (such as using NBC’s Peabody Award winning registered trademark “The More You Know” to brand the NBC E/I block produced by Litton). Both networks and the FCC have been careful to protect the brand identity of stations. See, e.g., *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, Report and Order*, 19 FCC Rcd 18279, 18291 (2004) (“because the PSIP protocol preserves stations’ analog brand identity, channel election decisions need not be based on considering stations’ historic ‘branding’ to consumers, but instead may be based more on the operating characteristics of a particular frequency and the service populations the stations would project for each channel”); see also *PMCM TV, LLC v. RCN Telecom Services, LLC, et al.*, FCC 17-117 (released September 15, 2017) ¶ 11 (“The Commission’s decision to tie the on-channel carriage option to PSIP channels serves this statutory purpose because it preserves broadcast stations’ brand identity, allowing stations to elect cable carriage on the same channel numbers stations use to identify and market themselves to over-the-air viewers. PMCM’s statutory interpretation, in contrast, would allow



The FCC previously addressed allowing stations to offload completely their programming obligations to other stations in the market in 1996 and rejected it as contrary to the language of the CTA:

Finally, we note that the text of this provision [to credit sponsoring E/I programming on other stations] plainly does not relieve a broadcaster of the obligation to air core programming. The statute permits the Commission to consider special nonbroadcast efforts only “in addition to consideration of the licensee’s [educational] programming.”<sup>76</sup>

The *NPRM* and commenters can point to no other statutory language or legislative history to conclude that the FCC was wrong in 1996 to require stations to air some E/I programming if they were seeking a license renewal under “Category B” processing guidelines. If the FCC is going to provide additional guidance under “Category B,” it must reiterate the statutory language requiring that such sponsorship cannot supplant a station’s obligation to air some amount of E/I programming.

Moreover, Litton is concerned that stations could avoid having to air E/I programming by paying weaker stations in their markets to air programming. Such stations may not have the same signal reach or MVPD carriage that a major station in the market might have.<sup>77</sup> If the

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broadcasters to elect carriage only on their RF channels and thus would disrupt the existing must-carry regime by depriving broadcasters of the right to cable carriage on the channel number on which they have built their brand and on which viewers would expect to find the station”) (footnote omitted). If viewers no longer care where programming is located, why are the networks and the FCC so concerned about preserving the “brand” of stations? The answer is simple – networks and stations vitally care about their brands, and what programs they air. The same has applied to children’s E/I programming, and networks and stations, up until now, who have attempted to provide the most attractive E/I programming they can that assists in brand building.

<sup>76</sup> 1996 Order, ¶ 137 (quoting Section 103(b) of the CTA). See *id.*, ¶ 138 (“Also, we note again that the text of Section 103(b) does not relieve a broadcaster of the obligation to air programming specifically designed to serve the educational and informational needs of children. It permits the Commission to consider sponsorship nonbroadcast efforts only ‘in addition to consideration of the licensee’s [educational] programming’”).

<sup>77</sup> Indeed, it is not clear under this proposal whether a station could offload its E/I programming responsibilities to a Class A or low power television station that does not have MVPD carriage or comparable signal reach.

Commission is to provide clarification as to how much programming can be offloaded to other stations, it should adopt rules similar to what it has done with the current multicast and preemption rules that require comparable MVPD coverage for any secondary station on which a station wishes to sponsor E/I programming.<sup>78</sup> Otherwise, the Commission may wake up one day and find a major market's entire E/I programming being aired on a station licensed to a community at the periphery of the market that long ago lost carriage rights in the core of the market.

### **III. CONCLUSION**

The need for safe, reliable, and sound educational and informational programming is no less today than it was in 1990. While there are millions of “voices” aimed at grabbing our children’s attention over the myriad of new platforms, this does nothing but underscore the fact that the one place parents can turn with their children to view E/I programming is broadcast television. No other platform is required by law to inform and educate, and no other platform is required to make clear when its programming is specifically designed to serve such needs. Changes to the rules that promote this outcome are welcome. Changes that act to undercut the

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<sup>78</sup> See *2004 Order*, ¶ 24 (“To provide broadcasters with flexibility in choosing how best to serve their child audience, however, we will permit digital broadcasters to air all of their additional digital core programming, beyond the 3 hour baseline on the main digital program stream, on one free digital video channel or distribute it across multiple free digital video channels, at their discretion, as long as the stream/s on which the core programming is aired has comparable carriage on multichannel video programming distributors (‘MVPDs’) as the stream whose programming generates the core programming obligation under the revised processing guideline”); *id.* at ¶ 40 (“for digital broadcasters we will not consider a core program moved to the same time slot on another of the station’s digital program streams to be preempted as long as the alternate program stream receives MVPD carriage comparable to the stream from which the program is being moved and the station provides adequate on-screen information about the move, including when and where the program will air, on both the original and the alternate program stream”) (footnote omitted).

availability to all children of quality E/I programming must be rejected as antithetical to congressional intent.

For these reasons, Litton urges the FCC to continue to require that all stations maintain E/I programming on their main streams, and in a manner consistent with the rules that have existed for the past 30 years, with only the changes suggested here and in our original comments.

Respectfully submitted,

LITTON ENTERTAINMENT

By: \_\_\_\_\_/s/ \_\_\_\_\_

James E. Dunstan

Mobius Legal Group, PLLC

P.O. Box 6104

Springfield, VA 22150

Telephone: (703) 851-2843

Counsel to Litton Entertainment

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